shall not in any way be fettered by any arrangement written otherwise made between the parties hereto or between the bank on the one part or any other third party on the other jointly or otherwise with the chargor or before the execution hereof up to an aggregate total amount not exceeding $2m only.

We would emphasize the words 'in amount duration and in all other respects to be determined and decided at the sole discretion of the bank'.

The words on which Mr Lee relies in the 1986 guarantee are as follows:

> In consideration of the forebearance by Citibank ... in not insisting on immediate payment of the sum now owing to the bank by the company and in consideration of your from time to time make, (we think they mean making) or continuing loans or advances to or coming under liabilities or discounting bills...

and then follow many other ways in which banks are accustomed to make facilities available, but there is no mention of any particular amount.

Mr Lee suggests that the consideration in the guarantee should be read conjuntively so as to oblige the bank to comply with each and every one of them. And as far as 'making loans' is concerned, that should be taken together with the land charge and imply a positive obligation to lend $2m. We think that one needs only to read out, as we have, the relevant portions of these two documents to show clearly that this argument is misconceived and must inevitably fail.

Mr Lee asks that, should we be minded to dismiss the appeal, we consider staying the execution of the judgment upon the claim pending the result of the counterclaim by the first and the fourth defendants, which technically remains in being. We are not prepared to make that order, the issues in the counterclaim are the same as those in the claim and depend likewise upon the defendants' being able to establish upon the bank an obligation to lend a further $2m. In our view the counterclaim, if pursued at all, must inevitably fail.

For these reasons, the only order that we make is that the appeal shall be dismissed with costs.

Appeal dismissed.

Clidero & Lee; Susannah Lim & Co.

Reported by *Ng Sheau Jiuan*

Tay Swee Sen v Goh Chio Tee

COURT OF APPEAL (BANDAR SERI BEGAWAN) — CIVIL APPEAL NO 2 OF 1989
DEREK CONS AG PRESIDENT, HUNTER AND BOKHARY COMMISSIONERS
15 NOVEMBER 1989

Negotiable Instruments — Dishonoured cheques — Cheque given to plaintiff as some form of security in loan transaction — Fraud or duress not established — Defence of illegality of tontine — Plaintiff's claim not reliant on tontine arrangement — Action upon negotiable instruments confer sufficient rights

The plaintiff's claim was based upon two cheques, for $5,000 and $95,000 respectively, drawn by the defendant in the plaintiff's favour but which were dishonoured upon presentation. The plaintiff appealed against the decision of the lower court whereby it set aside a default judgment given earlier in favour of the plaintiff. In the affirmations filed by the defendant, there seemed to be the suggestion of a $100,000 loan to L from which the plaintiff was to receive interest at 8%, of which 3% would be given to the defendant. The cheque for $5,000 was said to be the balance due to the plaintiff upon one particular month's payment of interest. The cheque for $95,000 was said to have been originally handed over in blank for 'safe keeping' and only subsequently filled in by the plaintiff for that amount. The defence strongly suggested fraud with regard to the $95,000 cheque and duress as to the cheque for $5,000. The other defence raised was that of illegality of the tontine by which the plaintiff was said to have raised money for the loan, using her husband's business name to conceal her own identity.

Held, allowing the plaintiff's appeal:

(1) Whether the loan of $100,000 was made to the defendant for the benefit of L or whether it was made to him directly, the blank cheque signed by the defendant was given to the plaintiff as some form of security. In those circumstances, the court sees no possible defence to the claim thereon, nor has duress been made out as to the other cheque.

(2) The defendant's point on illegality could be of no benefit to the defendant. Firstly, she was an equal party to the tontine and to any illegality that followed, by reason of the membership of her husband on her behalf. Secondly, the action brought by the plaintiff does not, and does not need to, rely in any way upon it. It is an action upon negotiable instruments, which of themselves confer sufficient rights upon her as the holder.

Angking Embah for the plaintiff/appellant.
Defendant/respondent in person.

Cur Adv Vult

Derek Cons Ag President (delivering the judgment of the court): This is an appeal against the decision of Nazareth J, whereby he set aside a default judgment given earlier in favour of Madam Tay Swee Sen ('the plaintiff') and instead gave leave to defend to Madam Goh Chio Tee ('the defendant'). The leave was conditional upon payment into court of $7,000 which we understand has been done.

The plaintiff's claim is based upon two cheques, respectively for $5,000 and $95,000, both drawn by the

defendant in the plaintiff's favour and dated 23 April 1986. It is not disputed that she is the holder of the cheques, nor that they were dishonoured upon presentation. The plaintiff obtained her judgment in October of 1986. In addition to the order for payment of $100,000, it provided for interest until payment, and for $200 costs. It is not necessary to go into the details of the difficulties that the plaintiff experienced in seeking to enforce her judgment. It is sufficient to note that by the end of November last year, which we would emphasize was some two years after judgment had been entered, only $23,000 had been paid towards the judgment debt, which then, by reason of interest, still stood at something over $93,000. That payment had only been achieved by reason of two committal orders made against the defendant. A third such order in January this year prompted the application which, after being refused by the registrar, resulted in the order of Nazareth J.

Two affirmations were filed in support of the application, one by the defendant and one by her husband. The only explanation for delay would seem to be ignorance of the rules of court. That was put forward by the husband. In addition, the defendant suggested that she was not given a fair hearing when examined upon a debtor summons in May of 1987, and that she was sick when the last committal order was made in her absence. That last matter, incidentally, is confirmed by the plaintiff.

Although the affirmations are quite lengthy, it is not easy to discern from them the actual defence. Fraud is strongly suggested with regard to the $95,000 cheque, and duress as to the cheque for $5,000. But the affirmations do not tell us what exactly is alleged. Basically there seems to be the suggestion of a $100,000 loan to a gentleman by the name of Mr Lim Soon Tien, from which the plaintiff was to receive interest at 8%, of which 3% would be given to the defendant. The cheque for $5,000 is said to be the balance due to the plaintiff upon one particular month's payment of interest. The cheque for $95,000 is said to have been originally handed over in blank for 'safe keeping' — we take those words directly from the affirmation — and only subsequently filled in by the plaintiff for that amount. One may surmise that this was done when Mr Lim left Brunei for good in October 1985, leaving at least part of his debt unpaid. Reference is also made to a 'tontine' by which the plaintiff is said to have raised money for the loan, using her husband's business name to conceal her own identity. But the precise relevance of the arrangement is not clear.

At the hearing today we have had the benefit of reading the defence filed pursuant to the order made by the judge. Attached to that are two supplemental affirmations at which we have not looked. We have also had the benefit of explanations from the defendant herself, she not being represented, in answer to questions that we put to her.

It is well established that this court will be slow to disturb the decision of a judge of first instance where it arises from the exercise of his discretion unless he misapprehended the law or the evidence or was simply plainly wrong. With regard to the two years' delay, we have serious doubts whether in this instance Nazareth J's decision does not fall within the last category. But in the event it is not necessary for us to come to a definite conclusion. Having now seen the defence, and in particular having regard to what the defendant has told us this morning, we are left in no doubt that whether the loan of $100,000 was made to the defendant for the benefit of Mr Lim or whether it was made to him directly, the blank cheque signed by the defendant was given to the plaintiff as some form of security. In that circumstance, we see no possible defence to the claim thereon; nor has duress been made out as to the other cheque.

There remains one other matter which is raised, by the defence, the question of illegality. The defendant has told us that in her view a tontine is something like gambling and therefore should be held illegal. Counsel for the plaintiff assures us that he is not aware of any law in Brunei which makes such an arrangement illegal, and we ourselves know of none. In any event the point could be of no benefit to the defendant. First, she was an equal party to the tontine, and to any illegality that followed, by reason of the membership of her husband on her behalf. Secondly, the action brought by the plaintiff does not, and does not need to, rely in any way upon it. It is an action upon negotiable instruments, which of themselves confer sufficient rights upon her as the holder.

For these reasons, the appeal is allowed and the judgment dated 4 October 1986 reinstated. We make an order that the appellant shall have her costs of the appeal and of the hearing below and that payment of the $7,000 into court be made to the plaintiff's solicitor in part satisfaction of the judgment debt.

Appeal allowed.

Solicitors: *DF Abang Zen.*

Reported by *Ng Sheau Jiuan*